JAN
MICHAEL RODAK,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-6757

DAVID X. FONTAINE,

Petitioner,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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OPINION BELOW

The court of appeals affirmed the district court by order without opinion. (A. 34). The opinion of the district court is reprinted in the Appendix. (A. 30-31).

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1972. The petition for a writ of certiorari was filed on June 1, 1972 and granted on November 6, 1972. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Was petitioner entitled to an evidentiary hearing under 28 U.S.C. §2255 upon allegations that: (a) his uncounseled plea and waiver of counsel were produced by police coercion; (b) he was mentally incompetent at the time of the plea?

II. Do the principles of the "guilty plea trilogy," *McMann v. Richardson, Brady v. United States,* and *Parker v. North Carolina*, justify denial of the §2255 motion in this case without a hearing?

III. Assuming trial court compliance at plea with the minimum requirements of Rule 11, Fed.R.Crim.P., does such compliance *per se* foreclose the right to a §2255 hearing upon a collateral claim of coercion?

IV. (a) Was petitioner's plea invalid for want of a valid waiver of counsel on the face of the record?

(b) Should this Court, under its federal supervisory power, preclude the uncounseled guilty plea, or require that no waiver of counsel is valid unless the pleading defendant has at least once considered the waiver with counsel?

CONSTITUTIONAL PROVISION, STATUTE, AND RULE INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 2255 of Title 28 provides in relevant part:

> §2255. Federal custody; remedies on motion attacking sentence
>
> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and

make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

* * * *

Rule 11 of the Federal Rules of Criminal Procedure provides:

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

STATEMENT

This case concerns a federal prisoner's collateral attack upon a guilty plea entered without counsel. Petitioner, David Fontaine, filed a *pro se* motion to vacate his sentence under 28 U.S.C. §2255 alleging, with details and documentation, that his plea and waiver of counsel were the direct product of police coercion upon a disturbed mind. Although the United States Attorney did not deny petitioner's factual allegations, the district court denied the §2255 motion without taking evidence. Relying upon the plea-taking procedures under Rule 11, Fed.R. Crim.P., *McCarthy v. United States*, 394 U.S. 459, and the principles this Court set forth in *Brady v. United States*, 397 U.S. 742 and *McMann v. Richardson*, 397 U.S. 759, the district court determined that a prisoner who had been examined at plea in accord with Rule 11 "cannot now be heard to collaterally attack the record and deny what was said in open court." (A. 31)

The conviction petitioner attacks was obtained against him in November 1969 upon his *uncounseled* plea of guilty to a one-count information charging a federal armed bank robbery one month earlier. 18 U.S.C. §2113(d). Petitioner, still unrepresented, was then sentenced in February to a term of twenty years. 18 U.S.C. §4208(a)(2).

His §2255 motion alleges substantially as follows: About three weeks prior to his plea, local Detroit police unlawfully broke into his home, awakened him and his family and clubbed him into unconsciousness before taking him to jail for interrogation. At the jail, he was handcuffed to a chair and abused, physically and verbally, during interrogation about several crimes. One officer called him a "nigger bastard" and threatened "to beat him to death if he didn't cooperate . . . . " (A. 10)

At the time of this interrogation, petitioner was suffering from an abdominal gunshot wound received two weeks earlier, which began to bleed as a result of police maltreatment. When he asked for a doctor, the police conditioned permission upon "cooperation". Petitioner's subsequent request for a lawyer was met with a slap in the face and a warning that, unless he talked, more physical abuse would follow. Finally, he "agreed to anything they asked of him and signed several papers . . . . " (A. 10)

Then petitioner fainted and woke up at a Detroit hospital. A "Discharge Summary" attached to the §2255 motion shows that petitioner was admitted to that hospital on the night of his arrest with a two-week old gunshot wound and was discharged five days later. (A. 19-20)

The §2255 motion alleges further that, during petitioner's hospital stay, interrogation resumed and that "while ill and mentally disturbed [he] let the police intimidate and coerce him into an agreement to enter a plea of guilty to armed bank robbery," a crime he did not commit. (A. 11) He was told that unless he pleaded guilty in federal court he would be prosecuted in state court and sentenced to life imprisonment. And he was propelled to acquiesce in the guilty plea by "a constant fear that the police will kill him if he does not obey". (A. 11) This fear derived from an adolescent experience in 1962 in which police shot him in the head. This 1962 wound led to persistent epilepsy and other mental problems that were still operative at the time of the plea and contributed to its involuntariness.

In support of the foregoing allegations, petitioner also attached to the 2255 motion another "Discharge Summary" arising from a second hospitalization during his

incarceration after plea, but prior to sentencing. This document evidences a history of headache and seizures since 1962 for which petitioner was placed on Dilantin and Phenobarbital. It also reflects petitioner's persistent pain from the abdominal gunshot would prior to plea, a present condition of serum hepatitis, and symptoms of heroin withdrawal in jail. (A. 16-18)

Finally, petitioner alleges that he "never had the advice of counsel at any stage of the proceedings," (A. 11) and with his seventh grade education he could not comprehend the "jargon" at the plea proceeding.

Accordingly, the upshot of petitioner's §2255 motion is that, at the time of plea, petitioner was so mentally disturbed and "conditioned" (A. 11) by the police for the proceedings in Court that his waivers of counsel and trial were the unintelligent and involuntary product of a coerced and disturbed state of mind. In addition, the motion alleges that petitioner was mentally incompetent at the time of plea.

The United States Attorney moved to dismiss petitioner's motion but did not deny any of the factual allegations pertaining to police coercion or mental disturbance. (A. 22-24) Like the district court and the court of appeals to follow, the motion to dismiss did no more than rely upon attached court transcripts and Rule 11 to dispose of petitioner's claims.[1]

[1] The two courts below relied only upon the plea proceedings. (A. 30-31, 34) The United States Attorney looked also to the proceedings at sentence (A. 8) to suggest that petitioner was silent even at this stage as to any police abuse. (A. 23) But at sentencing petitioner was asked no questions that might have elicited such a response and, indeed, he was all but told that it was too late to discuss the plea at that point. "This isn't the time for your plea." (A. 8)

Since the Rule 11 proceeding relied upon was quite short, we set it forth here in its entirety.[2]

Proceedings had in the above-entitled matter before Honorable Fred W. Kaess, District Judge at Detroit, Michigan, on Thursday, November 13, 1969.

APPEARANCES:

JOSEPH ZANGLIN, Esq.
(Assistant United States Attorney)
Appearing on behalf of the United States of America

THE CLERK OF THE COURT: The United States of America vs David Fontaine.

MR. ZANGLIN: Your Honor, this is an arraignment on an information charging the defendant with armed bank robbery. He's been given a copy of the Information. He acknowledges that he understands it and knows what the maximum penalty is.

I have explained to him his right to an indictment by a Grand Jury. He has waived that right and signed a waiver of Rights Form.

He understands that he has a right to an attorney at this time and he informs me that he wants to waive that right and has signed a waiver of that right. Knowing all of these rights he informs me that he intends to plead guilty to the information.

THE COURT: You are Mr. David Fontaine?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: You have received a copy of the information here, the charge here against you for armed bank robbery, is that right?

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[2]The one-page sentencing proceeding which is the only other pre-motion part of the record is set forth in the Appendix. (A. 8)

DEFENDANT FONTAINE: Right.

THE COURT: The first thing of consequence is that you have signed also a waiver of Grand Jury indictment which means you are entitled to have this matter first submitted to a Grand Jury and a determination made by that body and an indictment returned first; do you understand that and the rights you have thereunder? Anyway, that's what you will get if you wanted it to go to the Grand Jury.

DEFENDANT FONTAINE: Yes.

THE COURT: You have signed a waiver of that right, am I right?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: In addition, you are entitled to be represented by an attorney and, if you are without funds with which to employ an attorney, the Court will appoint one for you. The Court has here before it a waiver of assignment of an attorney. Is it your wish to proceed here without an attorney?

DEFENDANT FONTAINE: I guess so.

THE COURT: You have got to know so.

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Are you aware of the maximum penalty in this case? Not that you will get it because I don't know nor does anyone else what the penalty will be, but the maximum penalty under your plea if you do plead, is 25 years and/or $10,000.00 fine; do you understand that?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: You understand the maximum penalty?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Knowing all these things, is it your wish then that—are you prepared to plead now?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: How do you plead, sir.

DEFENDANT FONTAINE: Guilty.

THE COURT: With respect to your plea of guilty has anyone made any promise to you of any kind with respect to this matter in order for you to offer your plea of guilty here?

DEFENDANT FONTAINE: No, sir.

THE COURT: No one has threatened you?

DEFENDANT FONTAINE: No, sir.

THE COURT: Do you understand the nature of the charge? Do you know what you are charged with?

DEFENDANT FONTAINE: Yes I know what I am charged with.

THE COURT: What are you charged with?

DEFENDANT FONTAINE: Bank robbery.

THE COURT: Armed.

DEFENDANT FONTAINE: Armed bank robbery.

THE COURT: On October 8th?

DEFENDANT FONTAINE: Right. I don't know too much about the law because I have never been in Court before.

THE COURT: I just want to know that you know what you are doing.

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Is it your wish that the Court accept your plea of guilty here to this offense of armed bank robbery?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Did you actually do that?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Did you actually attempt to rob a bank, or did, I guess you did, of some $1,400.00?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Are you knowingly and freely and voluntarily offering your plea of guilty here?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: I want to be sure that you know what you are doing. You are pleading guilty to armed bank robbery occurring on October 8th of the Liberty State Bank in Hamtramck.

DEFENDANT FONTAINE: Yes, sir.

THE COURT: And by the use of a gun, pistol, right?

DEFENDANT FONTAINE: Right.

MR. ZANGLIN: Your Honor, I would suggest that the Court ask the defendant to put on the record some of his own statements concerning the specifics concerning this crime.

THE COURT: What did you do on October 8th?

DEFENDANT FONTAINE: I held the bank up.

THE COURT: What?

DEFENDANT FONTAINE: I held up the teller.

THE COURT: You held up a teller.

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Did you take from him some $1,400.00 plus?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Any more?

MR. ZANGLIN: Was anyone with you when you committed this robbery?

THE COURT: He is charged with aiding and abetting Gregory Edward Lee.

MR. ZANGLIN: No, I think Edward Gregory Lee abetted him.

THE COURT: Aided and abetted by Edward Gregory Lee. That's the charge, do you understand that?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Is it your wish that the Court accept your plea?

DEFENDANT FONTAINE: Well, your Honor I wish you would accept my plea on the fact that I have never had a past record. I got strung up on the drugs and I started to make some money.

THE COURT: The Court will accept your plea and refer you to the Probation Department for a pre-sentence report.

MR. ZANGLIN: As to bond, we would recommend a $20,000.00 cash or surety bond.

THE COURT: It may be so ordered.

SUMMARY

I. Congress intended the statutory motion to vacat sentence, 28 U.S.C. §2255, to be a remedy "as broad a habeas corpus." *United States v. Hayman*, 342 U.S. 205 217. This Court's cases confirm that habeas corpus wa traditionally available to challenge guilty pleas as coerced See *e.g., Walker v. Johnston*, 312 U.S. 275. They sho too that an evidentiary hearing was required in habea whenever material allegations of fact were in dispute without regard to the probability that a coercion claim sufficient in law, would be sustained in fact. *Waley v Johnston*, 316 U.S. 101.

Congress embodied the same requirements in §225 when it provided that a "hearing" must be granted unles

it "conclusively" appears from the "motion and the files and records of the case" that no relief is possible. In *Machibroda v. United States*, 368 U.S. 487, and *Sanders v. United States*, 373 U.S. 1, these standards were reaffirmed by this Court even where a defendant accompanied his plea with statements inconsistent with his allegations on collateral attack. Accordingly, the statements of a defendant at plea do not "conclusively" dispose of a later motion. This conclusion is particularly compelling where the very claim on collateral attack is that the plea, and accompanying statements, were the direct product of police coercion.

In this case, petitioner's factual allegations of direct coercion are not specifically denied, much less "conclusively" rebutted. Accordingly, he was wrongfully denied a hearing below.

Petitioner Fontaine was unrepresented by counsel from arrest through custody and plea. This Court has steadfastly taken "special care" to scrutinize pleas entered by uncounseled defendants. This approach was reasserted in the "guilty plea trilogy": *McMann v. Richardson*, 397 U.S. 759; *Brady v. United States*, 397 U.S. 742; *Parker v. North Carolina*, 397 U.S. 790. The trilogy emphasized the reasonable advice of counsel as insulating a guilty plea from various collateral claims that it was coerced. The cases specifically except from such insulation instances where the pleading defendant was uncounseled or later claimed that his guilty plea was the direct product of police coercion. Thus, to the extent the trilogy is relevant, it confirms the need for collateral review in uncounseled cases.

Mere compliance at plea with the minimum requirements of Rule 11, Fed.R.Crim.P., likewise does not justify summary denial of a §2255 attack based upon

direct coercion. The judicial inquiries prescribed by that Rule, and enforced in *McCarthy v. United States*, 394 U.S. 459 are minimum requirements for the acceptance of any plea. No plea is valid without such compliance. But although an expansive inquiry under that Rule might "facilitate" disposition of collateral claims, it cannot dispose "conclusively" of subsequent claims of direct coercion. Particularly is this true when the inquiry under the Rule is as perfunctory and ritualistic as it was here. Indeed, in this case the failure to explain the federal element of the offense at plea might even be taken to rebut compliance with the Rule.

Moreover, if Rule 11 compliance is held to bar collateral relief, §2255 is not, as promised, as broad a remedy as habeas corpus. In habeas, a hearing is required where the "material facts were not adequately developed" at a prior hearing. That standard for a mandatory hearing was announced in *Townsend v. Sain*, 372 U.S. 293, 313, and held applicable under §2255 in *Kaufman v. United States*, 394 U.S. 217, 227.

II. Although an evidentiary hearing on his §2255 motion is the least that is required in this case, this Court should order petitioner's motion granted upon the existing record. That record fails to show a valid waiver of counsel at plea and, under the Sixth Amendment, no uncounseled plea can survive that record inadequacy. *Johnson v. Zerbst*, 304 U.S. 458, 468; *Boykin v. Alabama*, 395 U.S. 238; *Carnley v. Cochran*, 369 U.S. 506. This record does not even show an unequivocal rejection of an offer of counsel, much less the other prerequisites of a valid waiver—an "intelligent" and "voluntary" decision. Indeed, this "waiver" falls below any standard developed either by this Court or the courts of appeals, see *e.g., United States ex rel Miner v.*

Erickson, 428 F.2d 623 (8th Cir. 1970). The trial court here did not inform the defendant that counsel could be useful in considering whether to plead, emphasize the seriousness of the offense, ask why the defendant did not want counsel, reoffer counsel when signs of doubt appeared, or make any inquiry whatever into whether the defendant understood the consequences of the waiver. Whatever the proper standard of judicial inquiry, this bareboned proceeding cannot pass muster under the Sixth Amendment.

Finally, this Court should adopt, under its supervisory power, a rule barring any uncounseled guilty plea, or requiring as a minimum that such a plea be preceded by counseled consideration of a proposed waiver. Such a rule has been endorsed in the States and elsewhere, serves a recognized interest of justice, and is a vital step in the development of a guilty plea process that is resistant, if not immune, to collateral attack.

ARGUMENT

I. UNDER 28 U.S.C. §2255 AND THIS COURT'S PRECEDENTS, PETITIONER WAS ENTITLED TO AN EVIDENTIARY HEARING.

The principal claim advanced in petitioner's §2255 motion is that his guilty plea and accompanying waivers were coerced. The motion alleges police abuse and intimidation during a three-week period beginning at arrest, continuing through hospitalization, and carrying over to taint the uncounseled plea proceedings. Petitioner portrays, in short, "a stream of events" with an unbroken coercive impact which came to dominate his weakened mind at an uncounseled plea. See *Darwin v. Connecticut*, 391 U.S. 346, 349 (confession); *Clewis v. Texas*, 386 U.S.

707, 710 (confession); *Chambers v. Florida*, 309 U.S. 227, note 2 (confession and plea); *Pennsylvania ex rel Herman v. Claudy*, 350 U.S. 116 (confession and uncounseled plea). The specific factual allegations of coercion stand unrebutted and are stated with sufficient detail and documentation to "show that his version of events, if true, would require the conclusion that his [guilty plea] was involuntary." *Procunier v. Atchley*, 400 U.S. 446, 451. Moreover, nothing in the motion or "the files and records of the case conclusively show[s] that the prisoner is entitled to no relief. . . ." 28 U.S.C. §2255.

In this posture, petitioner was wrongfully denied his right to a hearing conferred by the statutory command of §2255 and a solid body of this Court's case law.

A. The Statute

As a matter of statutory construction, coerced plea claims come easily within the ambit of the motion procedure. A prisoner contending that his guilty plea was coerced is "claiming the right to be released upon the ground that [his] sentence was imposed in violation of the Constitution . . . of the United States." 28 U.S.C. §2255. *Kercheval v. United States*, 274 U.S. 220. *Pennsylvania ex rel Herman v. Claudy*, 350 U.S. 116. *Machibroda v. United States*, 368 U.S. 487. When such a claim is tendered, §2255 speaks of the right to a hearing in mandatory terms: A court in receipt of such a motion "shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." A narrow exception to the mandatory hearing requirement is provided for those instances in which "the motion and the files and records of the case *conclusively* show that the prisoner is entitled to no relief. . . ." 28 U.S.C. §2255 (emphasis supplied)

B. The Case Law

This Court's cases show beyond question that petitioner's motion commands a hearing under the broad statutory right and lies beyond the scope of the narrow exception. Historical perspective is useful in establishing that conclusion.

There can be no doubt that coerced plea claims were historically heard in federal habeas corpus and meant to be heard under §2255 after Congress enacted it in 1948. This Court so observed in the foundation case of *United States v. Hayman,* 342 U.S. 205, sustaining the motion procedure afforded by §2255 against the contention that it "amounted to an unconstitutional 'suspension' of the writ of habeas corpus. . . ." 342 U.S. 205, 209. The *Hayman* Court concluded that §2255 raised no question of suspension, for Congress intended it to provide "a remedy . . . as broad as habeas corpus". 342 U.S. at 217.

> Nowhere in the history of 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose [of §2255] was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum. 342 U.S. at 219.

And the *Hayman* Court specifically noted that habeas corpus would traditionally have been available to "challenge . . . convictions on facts dehors the record" showing that a guilty plea had been coerced.[3] 342 U.S. at 212 and

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[3]This Court has specifically endorsed the mode of analysis by which reference is made "to our decisions respecting the availability of the federal habeas remedy in deciding the question" of what claims can be raised under §2255. *Kaufman v. United States,* 394 U.S. 217, 220.

note 12. Indeed, the *Hayman* opinion gave prominence to *Walker v. Johnston*, 312 U.S. 275, as a case involving a coerced plea claim, traditionally heard in habeas, that could more conveniently be heard in a §2255 proceeding. Like petitioner Fontaine, Walker had been convicted upon an uncounseled plea of guilty to a charge of federal armed bank robbery. 312 U.S. at 279-80. Years later, he filed in federal habeas corpus upon the ground of coercion and was denied relief without a hearing. The *Hayman* Court recalled that

> In the Northern District of California, Walker alleged that he had been denied counsel and coerced into pleading guilty by the United States Attorney, his assistant and a deputy marshal in the Northern District of Texas. The District Court for the Northern District of California refused to grant the writ after receiving ex parte affidavits from the federal officers denying the allegations. This Court reversed, finding that Walker's application raised material issues of fact and holding that the District Court must determine such issues by the taking of evidence, not by ex parte affidavits. 342 U.S. 213.

The *Hayman* Court then went on to suggest that Congress now intended such claims as Walker's to be heard under §2255 at the situs of the sentencing court. 342 U.S. 213-14. And carrying the habeas parallel forward, the Court made clear, much as it had in *Walker*, that the §2255 substitute likewise required a judicial hearing to resolve factual disputes.

> In requiring a "hearing" [2255] "has obvious reference to the tradition of judicial proceedings." 342 U.S. at 220.

In between *Walker* and *Hayman*, this Court decided *Waley v. Johnston*, 316 U.S. 101, also cited in *Hayman*, 342 U.S. at note 12, which at once confirms and

advances the historical understanding. Waley, like Walker, also filed in federal habeas to challenge his prior guilty plea with specific allegations of coercion. By contrast with *Walker*, however, the Government's return in *Waley* included, as here, a transcript of the proceedings on arraignment, plea and sentence. The transcript disclosed that the trial court had advised Waley of his right to counsel and, indeed, had appointed counsel who represented Waley at plea. The return alleged by affidavit that Waley had also voluntarily signed two confessions; but, as here, no specific denial of the coercion allegations was set forth. The federal habeas court denied the petition without hearing evidence, finding inconsistencies in petitioner's allegations and observing that the transcript "showed that petitioner was neither 'actuated nor induced by fear' . . . ."[4] 316 U.S. at 103. The court of appeals affirmed this summary denial upon a ground reminiscent of the decisions below in this case. The court reasoned that a *counseled* plea of guilty " 'waived the defense and the constitutional right, if any he had, and [he] cannot assert it now on habeas corpus proceedings.' " 316 U.S. at 103-14.

In this Court, the Solicitor General confessed error, 316 U.S. at 104, "for the reason that the habeas corpus petition raises the material issue whether the plea was in fact coerced by the particular threats alleged which stand undenied on the record, and that upon that issue petitioner is entitled to a hearing in accordance with *Walker v. Johnston*. . . ." 316 U.S. at 104.

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[4] An additional ground involving *res judicata* was also ruled upon and ultimately rejected by this Court. 316 U.S. at 103, 105.

This Court accepted the confession of error in *Waley* in language that speaks importantly to the scope of the right to a federal habeas hearing prior to §2255.[5]

> True, petitioner's allegations in the circumstances of this case may tax credulity. But in view of their specific nature . . . and the failure of respondent to deny them specifically, we cannot say that the issue was not one calling for a hearing within the principles laid down in Walker v. Johnston. If the allegations are found to be true, petitioner's constitutional rights were infringed. For a conviction on a plea of guilty coerced by a federal law enforcement officer is no more consistent with due process than a conviction supported by a coerced confession. Bram v. United States, 168 U.S. 532 . . . ; And if his plea was so coerced as to deprive it of validity to support the conviction, the coercion likewise deprived it of validity as a waiver of his right to assail the conviction. Johnson v. Zerbst, 304 U.S. 458 . . .[6]

As of the enactment of §2255, then, this Court's decisions limiting summary denial in federal habeas corpus had virtually come to the very language Congress

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[5]During the pre-2255 period, this Court also decided a parallel guilty plea case holding that allegations of involuntariness by state prisoners require a hearing in state habeas corpus. *Smith v. O'Grady*, 312 U.S. 329 (1941).

[6]It is unclear from petitioner Fontaine's motion whether federal or state officers are charged with coercion. It would appear that local police arrested him, but that by the time of his first hospitalization, federal and state "police" were involved. The motion alleges that Fontaine "was told that if he did not enter a plea of guilty to the bank robbery charged in federal court that he would be prosecuted in state court and sentenced to life imprisonment." (A. 11) For constitutional purposes, however, the question of which authority performed the alleged coercion is irrelevant. *Cf. Elkins v. United States*, 364 U.S. 206.

chose to limit such denials in the new motion procedure. A hearing must be held "[u]nless the motion and the files and records of the case *conclusively* show that the prisoner is entitled to no relief. . . ." (emphasis supplied) 28 U.S.C. §2255.

The major decisions of this Court following the enactment of the motion procedure firmly carry this understanding forward. In 1962, *Hill v. United States*, 368 U.S. 424, confirmed that the new motion was intended to provide a "remedy *exactly commensurate* with that which had previously been available by habeas corpus in the . . . district where the prisoner was confined." 368 U.S. 424, 427. (emphasis supplied)

And the companion case to *Hill, Machibroda v. United States*, 368 U.S. 487, spoke with clarity to the limited power of summary denial in guilty plea cases. Machibroda, represented by retained counsel, had pleaded guilty to two charges of federal bank robbery. At the arraignment, he admitted that his pleas were voluntarily given. 368 U.S. at 500. Three years later, however, he moved under 28 U.S.C. §2255 upon the grounds, *inter alia*, that his pleas of guilty had not been voluntary and that the court had accepted them without first "determining" their voluntariness under Rule 11, Fed.R. Crim.P.[7] 368 U.S. at 489.

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[7]In 1962, Rule 11 provided, as it does now, see p. 37 *infra* that the trial court "shall not accept" a guilty plea without first "determining that the plea is made voluntarily. . ." The amendment of the Rule in 1966 added, *inter alia*, that the determination is to be made by "addressing the defendant personally." See Advisory Committee Notes to Rule 11, Fed.R.Crim.P.

The motion set forth detailed factual allegations of unfulfilled promises of leniency in exchange for a plea, as well as prosecutorial threats of reprisal if Machibroda disclosed the bargain to his lawyer. 368 U.S. at 489-90. The motion alleged further by affidavit that Machibroda had subsequently written two letters to the sentencing court complaining of the prosecutor's misrepresentations. 368 U.S. at 490. The Government's return specifically denied by affidavit any promises or coercion. And the sentencing judge, who had also taken the plea, 360 U.S. at 496, noted of his own knowledge that he had never received either of the two letters referred to, but had received a letter from Machibroda, asking for concurrent sentences, which conspicuously failed to mention any agreement with the prosecutor. 368 U.S. at 492-3. Relying as well upon other inconsistencies in the movant's allegations, the court denied the motion without a hearing.[8]

This Court reversed and remanded for the taking of evidence. Relying chiefly upon *Walker*, *Waley* and *Hayman*, Mr. Justice Stewart concluded that

> the District Court did not proceed in conformity with the provisions of 28 U.S.C. §2255 when it made findings on controverted issues of fact without

[8] As the dissent in this Court observed, 368 U.S. at 498-99, there were a variety of other circumstances tending to belie Machibroda's allegations: *e.g.*, (1) he had three times appeared before the court subsequent to the alleged "deal" without making any reference to it; (2) at the time of alleged promises, he had already agreed to waive indictment on the more serious robbery and had represented to the court, through his attorney, the possibility of a second waiver; and (3) before the alleged deal was to be performed, he gave testimony at a companion trial unfavorable to the Government.

> notice to the petitioner and without a hearing. 368 U.S. at 494.

Conspicuously, the Court did not say that Machibroda's admission of "voluntariness" at arraignment barred his subsequent motion. Neither did it say that if the Rule 11 voluntariness determination were shown to have been made by the Court, Machibroda's further allegations of extra-judicial coercion could not be entertained. Indeed, the opinion observes that the factual allegations of the motion

> related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light. Nor were the circumstances alleged of a kind that the District Judge could *completely resolve* by drawing upon his own personal knowledge or recollection. (emphasis supplied) 368 U.S. at 494-95.

Since a Rule 11 voluntariness determination would have been within the District Judge's recollection, *Machibroda* must have contemplated that even if such a determination had been made, a factual hearing was required to "completely resolve" the totality of the movant's factual allegations of coercion.[9]

To be sure, the *Machibroda* Court acknowledged that there might be some claims of such a nature that a full hearing with the movant present in the court might not be required.

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[9] The dissenting opinion likewise observed that the majority had held it "necessary to go outside the files and records to discover the truth of the matter." 368 U.S. at 497 (Clark, J.) A full discussion of the impact of Rule 11 on petitioner's right to a §2255 hearing is presented at pp. 36-47 *infra*.

> "Indeed, the statute itself recognizes that there are times when allegations of facts outside the record can be fully investigated without requiring the personal presence of the prisoner." 368 U.S. at 495.

But a hearing may be denied altogether only when, in this Court's words, the movant's allegations are not merely "improbable" but "incredible". 368 U.S. at 496.

This standard does no more than implement the narrow exception of the statute permitting a denial without hearing only when it is "conclusively" apparent "that the prisoner is entitled to no relief." And this Court's reading of that narrow exception continues to fulfill its promise in *Hayman,* for after *Machibroda* it is as true for §2255 as for habeas that:

> "The Government's contention that . . . allegations are improbable and unbelievable cannot serve to deny . . . an opportunity to support them by evidence." *Walker, supra* at 287. See also *Waley, supra* at 104.

Diehard doubts about how narrow the "conclusively" exception is were laid to rest in *Sanders v. United States,* 373 U.S. 1. Like petitioner Fontaine, Sanders had pleaded guilty to federal bank robbery without counsel. He too responded to the court's inquiry at plea by stating that he wished to waive counsel, indictment and trial. He did not appeal, but subsequently filed two successive motions under §2255. The first motion alleged, *inter alia,* that he had been coerced to plead in the absence of counsel, but it presented no factual detail. It was denied summarily, both as barren of factual allegations, and as "conclusively" rejected by the files and records of the case. 373 U.S. at 5. The second motion contended, this time in detail, that Sanders was mentally incompetent at plea as the result of narcotic addiction. This motion was

likewise summarily denied, in part upon *res judicata* principles and in part as "without merit in fact." 373 U.S. at 6.

This Court reversed and required a hearing. The opinion focuses principally upon an issue not present here—the criteria for determining when a summary denial is proper upon successive motions.[10] 373 U.S. at 15-19. But this Court in *Sanders* also disposed of the trial court's contention that the files and records "conclusively" rejected Sanders' allegations of incompetence. The language of this Court's disposition so clearly compels reversal in this case that it is worth quoting in full:

> But the 'files and records of the case' including the transcript [of the plea], could not 'conclusively show' that the claim alleged in the second motion entitled [Sanders] to no relief. . . . . However regular the proceedings at which he signed a waiver of indictment, declined assistance of counsel, and pleaded guilty might appear from the transcript, it still might be the case that petitioner did not make an intelligent and understanding waiver of his constitutional rights. [citations]. For the facts on which petitioner's claim in his second application is predicated are outside the record. This is so even though the judge who passed on the two motions was the same judge who presided at the hearing at which petitioner made the waivers, and the later hearing at which he was sentenced. Whether or not petitioner was under the influence of narcotics would not necessarily have been apparent to the trial judge. Petitioner appeared before him without

[10] That issue is not presented here, but the principles discussed do have some relevance to this case and are touched upon at pp. 46-47 *infra*.

> counsel and but briefly. That the judge may have thought he acted with intelligence and understanding in responding to the judge's inquiries cannot 'conclusively show', as the statute requires, that there is no merit in his present claim. *Cf. Machibroda v. United States*. . . .[11] 373 U.S. at 19-20.

In reaching the conclusion that the transcript of th plea proceeding could not be taken as "conclusive refutation of the motion, *Sanders* articulated one furth factor vital to this case. Like Fontaine, Sanders ha waived a lawyer at plea. After such an uncounseled pl proceeding, there is an added need for a fair collater hearing.

> Very possibly, the proceeding was constitutionally adequate. But by its summary nature, and because defendant was unrepresented by counsel, a presumption of adequacy is obviously less compelling than it would be had there been a full criminal trial. Moreover, the nature of the proceeding was such as to preclude direct appellate review. In such a case it is imperative that a fair opportunity for collateral relief be afforded. An applicant for such relief ought not to be held to the niceties of lawyers' pleadings or be cursorily dismissed because his claim seems unlikely to prove meritorious. That his application is vexatious or repetitious, or that his claim lacks any substance, must be fairly demonstrated. 373 U.S. at 22.[12]

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[11] The opinion of this Court also observes that, like Fontain Sanders had alerted the trial court to the existence of a dr problem and had been receiving withdrawal treatment prior sentence. 373 U.S. at 20.

[12] In the same Term as *Sanders*, this Court decided *Townsend Sain*, 372 U.S. 293, whose criteria for a mandatory hearing habeas corpus were held fully applicable under §2255. See *Kau man v. United States*, 394 U.S. 217, 226-27. At least two *Townse*

C. The Principles Applied

1. *The Coercion Claim*

On this record, it cannot be maintained that petitioner's allegations of coercion as to the plea and accompanying waivers are "conclusively" refuted by the "motion" itself or the "files and records of the case." 28 U.S.C. §2255. Indeed, nothing before this Court establishes that petitioner's allegations are so "incredible," 368 U.S. at 496 that anything less than a full evidentiary hearing is permissible under the statute.

On the contrary, the Government's response to the motion does not so much as deny any specific factual allegation of police abuse or overreaching.[13] Reliance is placed instead upon petitioner's responses at the plea proceeding. At that proceeding, petitioner denied the existence of threats and responded affirmatively to the question, "Are you knowingly and freely and voluntarily offering your plea of guilty here?" (A. 4-5).

But these are the very responses petitioner contends were coerced from him. Accordingly, it would thoroughly beg the question to say that they "conclusively' rebut the coercion claim. This Court has roundly denied any such conclusive effect to like expressions of voluntariness in confessions challenged as coerced. For "common sense dictates the conclusion that if the authorities were successful in compelling the totally

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criteria compel a hearing here, for the "merits of the factual dispute were not resolved" in any prior federal hearing; nor were "the material facts . . . adequately developed" at any such hearing. 372 U.S. at 313.

[13] By analogy to the procedure in habeas corpus, such undenied allegations might be taken as true, *Cf.* 28 U.S.C. §2448.

incriminating confession of guilt, the very issue for determination, they would have little, if any, trouble securing the self-contained concession of voluntariness."[14] *Haynes v. Washington,* 373 U.S. 503, 513. See also *Chambers v. Florida,* 309 U.S. 227.

This is precisely the point in *Sanders, supra,* as well. "However regular the proceedings at which he signed a waiver of indictment, declined assistance of counsel and pleaded guilty might appear from the transcript, it still might be the case that petitioner did not make an intelligent and understanding waiver of his constitutional rights." 373 U.S. at 19-20. As long as "it still might be," this Court's cases demand that petitioner's claim be heard.

Indeed, as long ago as *Waley v. Johnston, supra,* this Court provided the definitive answer to the Government's contention that petitioner's responses at plea conclusively rebut his later claims and defeat his right to a hearing. For "if his plea was so coerced as to deprive it of validity to support the conviction, the coercion likewise deprived it of validity as a waiver of his right to assail the conviction." 316 U.S. at 104.[15]

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[14] The courts of appeals have adopted similar principles. See *e.g., United States ex rel McGrath v. LaVallee,* 319 F.2d 308, 314 (2nd Cir. 1963) (hearing held despite denial of promise at plea); *Smith v. United States,* 223 F.2d 750 (5th Cir. 1955) (hearing held despite denial of coercion at trial); *United States v. McCarthy,* 433 F.2d 591, 593 (1st Cir. 1970) (acknowledging likelihood of denial by coerced defendant); *Hilliard v. Beto,* 465 F.2d 829 (5th Cir. 1972) (*Santobello* requires hearing even if denial of promises at plea.)

[15] Other contentions that might be advanced may weaken the credibility of petitioner's allegations but they do not "conclusively" dispose of them. For example: (1) petitioner did not attack his plea until a year and half after conviction. But the

2. *The Incompetence Claim*

Petitioner's motion alleges that "he has a severe mental problem and that he suffers from epilepsy and a mental trauma of major proportion due to his having been shot in the head by the police when he was a teenager." This early experience, he avers, induced in him a "fear of the police" that was "such a strong psychological force" that his mind was "conditioned . . . for the proceedings in Court." As a result, "he did not understand the consequences of his Constitutional waivers of counsel, Grand Jury and a plea of guilty." (A. 11) In addition, he is "uneducated (7th grade)" and found "the legal terms used by the Court . . . complete jargon . . . and beyond the sphere of his comprehension." (A. 12) Accordingly, petitioner's §2255 motion concludes that he "was mentally ill at the time of his arraignment and that his

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statute itself provides that a "motion for such relief may be made at any time," 28 U.S.C. §2255 and this Court has granted relief after longer delays. *Machibroda v. United States, supra,* (three years), *Palmer v. Ashe,* 342 U.S. 134 (eighteen years, state habeas), *Pennsylvania ex rel Herman v. Claudy,* 350 U.S. 116 (eight years, state habeas). In any event, such a timeliness claim may be heard on remand if the Government attempts to show "abuse of remedy." *Sanders, supra* at 17.

(2) Petitioner's own "Discharge Summary" attached to the motion fails to mention the physical abuse alleged or to report signs of it, although he was admitted to the hospital on the same evening as the abuse allegedly occurred. Again, this "omission" goes to credibility but does not demolish it. Moreover, the hospital, whose principal concern was the gunshot wound, could easily have disregarded superficial signs of abuse even if petitioner were sufficiently relieved of his fear of the police to have brought such abuse to medical attention. In fact, however, the motion does not allege that police maltreatment produced any bruises or lesions.

plea of guilty and waiver of Constitutional safeguards was a product of his mental illness." (A. 12)

In support of these allegations, the motion attaches two hospital documents, (A. 16-18) (A. 21) attesting to the teenage gunshot wound and the persistence of "headache and episodes of seizures." (A. 16) One of these documents, compiled upon his discharge from the Detroit General Hospital after plea but prior to sentencing, discloses that petitioner was discharged for return to jail with medication for "convulsive disorder." It also confirms that petitioner had been in jail continuously after arrest and had been experiencing heroin withdrawal symptoms. (A. 16)

These allegations may well be taken as part of the coercion claim. Indeed the motion alleges that "it was this traumatic condition which motivated movant's mental apparatus when he allowed the police to coerce and intimidate him into entering a plea of guilty to bank robbery." (A. 11)

To the extent that they allege mental "incompetence" at plea, however, they are sufficient to state a separate basis for a hearing under §2255.[16] *Sanders v. United*

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[16] In *Hayes v. United States*, 399 F.2d 691 (5th Cir. 1968), relied upon by the Government below, the court held that a §2255 motion alleging mental incompetence at plea may be summarily denied in the absence of "some specific facts regarding the claimed prior mental history, background, or incidents of aberration to support the conclusory allegations. . . ." The Sixth Circuit endorses the same rule, *Hartman v. United States*, 310 F.2d 447, 448 (6th Cir. 1962). It is implicit in the requirement that a motion state more than "bald legal conclusions." *Sanders, supra* at 19. The hospital documents in this case satisfy the rule. If they are deemed insufficient, however, the district court should "direct petitioner to amend his motion. *Sanders, supra* . . 19.

States, supra; Bishop v. United States, 350 U.S. 961 (§2255); *Dusky v. United States,* 362 U.S. 402; *Pate v. Robinson,* 383 U.S. 375.

II. THE PRINCIPLES OF THE GUILTY PLEA TRILOGY–McMANN, BRADY AND PARKER–SUPPORT THE RIGHT TO A HEARING IN UNCOUNSELED CASES

The district court found support for its summary denial here in the principles of *McMann v. Richardson*, 397 U.S. 759 and *Brady v. United States*, 397 U.S. 742. These cases were said to "reflect" the rule that the door to collat[illegible]al attack is closed by a judicial inquiry at plea such as that conducted in this case. In no way, however, do *Richardson* and *Brady*, or their companion, *Parker v. North Carolina*, 397 U.S. 790, "reflect" any such rule, or defeat by any other route petitioner's right to a hearing.

On the contrary, the distinguishing characteristics of the trilogy–the presence of counsel and the absence of claims of direct coercion–only highlight the merit of this petitioner's right to be heard.

The central problem considered in *Richardson* was the contention that a collateral hearing is required whenever it is alleged that an "otherwise valid guilty plea" was "motivated by *a prior coerced confession*." 397 U.S. at 760. (emphasis supplied). Richardson and other defendants in that case had all been advised by counsel at and prior to plea. In post-conviction petitions each alleged that his guilty plea would not have been entered "but for" prior coerced confessions. Each *Richardson* defendant also tendered other claims of more direct plea coercion or inadequacy of counsel. Each collateral attack was denied in the trial court, without a hearing, typically

for the reason that "a voluntary plea of guilty entered on advice of counsel constitutes a waiver of all non-jurisdictional defects in any prior stage of the proceedings against the defendant." 397 U.S. at 762.

The Court of Appeals reversed, requiring a hearing both as to the plea coercion claims arising from prior coerced confessions and as to those claims of more direct plea coercion or ineffective assistance of counsel.

This Court divided the difference. It upheld the trial court summary denials as to the prior confession claims, but declined to disturb the Court of Appeals' judgment that a hearing was required for the other claims.[17] 397 U.S. at 774-75.

The heart of this Court's reasoning is simply put:

> In our view a defendant's plea of guilty *based on reasonably competent advice* is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. . . . We hold, therefore, that a defendant who alleges that he pleaded guilty because of a prior coerced confession is not, *without more*, entitled to a hearing on his petition. . . ." 397 U.S. at 770-71. (emphasis supplied)

In reaching that result, the *Richardson* Court carefully excepted from its holding cases such as this one:

> "Neither do we have before us the uncounseled defendant, see *Pennsylvania ex rel v. Claudy* . . . nor the situation where the circumstances that coerced the confession have abiding impact and also taint the plea *Cf. Chambers v. Florida*, . . . It is not

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[17] The presence of the complicating *Jackson v. Denno* issue in *Richardson* is without relevance here.

disputed that in such cases a guilty plea is properly open to challenge." 397 U.S. at 767.

Upon that reasoning, the case at bar presents a guilty plea which is "properly open to challenge." The Court has before it a petitioner, uncounseled at any stage.[18] He does not allege a prior coerced confession "but for" which he would have demanded trial. His claim instead is that, although innocent, he pleaded guilty only under direct police coercion manifest in a stream of events whose coercive impact upon his disturbed mind was sustained through the plea itself.

In such a case, it cannot be determined "conclusively," without a hearing, that the plea was either voluntary or intelligent. Since Fontaine had no counsel at all, he had no "reasonably competent advice," 397 U.S. at 270, or, indeed any advice "within the range of competence demanded of attorneys in criminal cases," 397 U.S. at 771, sufficient to insulate the plea. Nor can the alleged "waiver" of counsel at plea perform as a substitute. For the "waiver" itself is alleged to be the direct product of continuing coercive influence. Petitioner's allegations therefore compel a hearing no less than the claims of direct coercion in *Richardson*.

Brady v. United States, 397 U.S. 742, dictates the same result. Brady pleaded guilty to kidnapping under the federal statute whose death penalty scheme this Court found unconstitutional nine years later in *United States v. Jackson*, 390 U.S. 578. Like the petitioners in *Richardson*, Brady was "represented by competent counsel throughout." *Id.* At his plea, the court inquired into

[18] On this record, petitioner's allegation is undisputed that "he was never before a U.S. Commissioner nor had the advice of counsel at any stage of the proceedings had." (A. 11)

voluntariness and renewed that inquiry at sentencing where Brady declined the court's specific invitation to withdraw his plea.[19] 397 U.S. at 743 and note 2. Years later, Brady sought relief by a § 2255 motion alleging involuntariness upon a variety of grounds, none of which charged direct police or prosecutorial coercion. The lower court afforded a full hearing but denied relief. 397 U.S. at 748.

This Court affirmed. It focused principally upon one ground of alleged coercion. Brady had contended that *any* guilty plea is coerced if motivated by *any* fear generated by the death penalty scheme later found unconstitutional in *Jackson*. This Court rejected that contention for reasons like those in *Richardson*. Counsel's failure to appreciate that, nine years later, the penalty scheme would be declared unconstitutional was, like decisions not to challenge the confessions in *Richardson*, within the range of reasonable legal competence. 397 U.S. at 757.[20]

In so deciding, this Court elaborated its reliance upon counsel's advice in terms that come home here. It recognized the long-standing dual requirement "that guilty pleas are valid only if both 'voluntary' and 'intelligent.' " 397 U.S. at 747. And with respect to those requirements, the Court observed that its own practice required "special care" in cases of uncounseled pleas:

> "Since an intelligent assessment of the relative advantages of pleading guilty is frequently impossible

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[19] By contrast, the trial court here cut off all inquiry into the plea at sentencing. (A. 8)

[20] In addition, Brady had been advised by counsel and was found, after full hearing, to have been motivated by considerations other than the penalty scheme.

> without the assistance of an attorney, this Court has *scrutinized with special care* pleas of guilty entered by defendants without the assistance of counsel and without a valid waiver of the right to counsel. 397 U.S. at 748, note 6. (emphasis supplied)

In the case at bar, *Brady's* expression of "special care" could only have been ignored. For the district court read that case to "reflect" a rule denying scrutiny even to a claim that a waiver of counsel had been coerced.[21]

Parker v. North Carolina, 397 U.S. 790, confirms that the guilty plea trilogy is no barrier to petitioner. Parker had retained counsel shortly after confession and was represented by him through a guilty plea. Like petitioner Fontaine, Parker denied in court that his plea was the product of threats, promises, or other compulsion. In his collateral attack, however, Parker contended, like Richardson, that his plea was coerced by a prior coerced confession; and like Brady, by an unconstitutional penalty scheme. 397 U.S. at 790 and note 3. After a full hearing, relief was denied and this Court confirmed that Parker's plea was both voluntary and intelligent. Significantly, however, this Court did not hold that Parker's "voluntariness" responses at plea were dispositive of his later coercion claims. 397 U.S. at 795. Instead, it relied

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[21] The *Brady* discussion of *Bram v. United States*, 168 U.S. 532, likewise "reflects" this Court's pointed recognition that the circumstances of an uncounseled accused deserve special scrutiny:

> "*Bram* dealt with a confession given by a defendant in custody, alone and unrepresented by counsel. In such circumstances, even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess." 397 U.S. at 754.

again upon the presence and reasonable advice of counsel, 397 U.S. at 792-98, among a totality of circumstances, to reject Parker's claims.

Richardson, Brady and *Parker* thus do not diminish in any way the solid body of case law in this Court that otherwise establishes petitioner's right to a hearing under § 2255. On the contrary, the guilty plea trilogy stands to reaffirm the need for special scrutiny in uncounseled cases. See also *North Carolina v. Alford*, 400 U.S. 25, 31.

III. THE PROCEEDINGS AT PETITIONER'S PLEA DO NOT DISPOSE CONCLUSIVELY OF HIS COLLATERAL CLAIM OF INVOLUNTARINESS

Clearly the principal justification offered below for summary denial in this case was the district court's alleged conformity "to the requirements of Rule 11 of the Federal Rules of Criminal Procedure, as dictated by *McCarthy v. United States*, 394 U.S. 459 (1969), in accepting petitioner's plea as voluntary." (A. 30-31) For reasons previously advanced, see pp. 27-28 *supra*, neither a defendant's naked denial of threats nor his abstract averment that a plea is "voluntary" can serve conclusively to dispose of a post-conviction claim that a plea, including those responses, was coerced.

Bare compliance with the requirements of Rule 11, Fed.R.Crim.P., does not serve that purpose either.[22] And

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[22] Circuits other than the Sixth Circuit have denied conclusive effect to a Rule 11 proceeding. See *e.g., Walters v. Harris*, 460 F.2d 988, 992 (4th Cir. 1972); *Reed v. United States*, 441 F.2d 569, 572 (9th Cir. 1971); See also *Barber v. United States*, 427 F.2d 70, 71 (10th Cir. 1971) (pre-1966 Rule 11; no hearing because no allegations "outside the record.")

nothing in *McCarthy v. United States, supra*, holds that it does.[23]

In pertinent part, Rule 11 provides:

> A defendant may plead not guilty, guilty or, with the consent of the court nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such pleas or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. . . . The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

The holding of *McCarthy* with respect to Rule 11 was carefully and narrowly defined by this Court:

> ". . . we hold that a defendant is entitled to plead anew if a United States district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11." 394 U.S. 463-64.

The *McCarthy* Court was not called upon to, and did not, hold that if the minimum procedures prescribed in the Rule are followed, that will forever foreclose all subsequent inquiry into the subjects (*e.g.*, voluntariness) dealt with in the Rule. In explicit language, the Court declined even to prescribe "general guidelines" for plea proceedings, save to indicate that "the nature of the inquiry required by Rule 11 must necessarily vary from case to case" and that "[i]n all such inquiries . . . 'reality, and not mere ritual should be controlling.' " 394 U.S. at

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[23] Since the plea in this case was taken on November 13, 1969, after the date of decision in *McCarthy*, of April 2, 1969, the holding of that case is applicable here. *Halliday v. United States*, 394 U.S. 831.

467, note 20. Instead, the *McCarthy* Court examined only the requirements that Rule 11 imposes upon the plea proceeding and held only that the entire proceeding is voidable by a defendant if the minimum procedural safeguards of the Rule are not accorded. That is to say, if a plea is to be valid *at all*, the court accepting it must address the defendant personally with respect to three subjects: (a) that the plea is made voluntarily, (b) that it is made with understanding of the nature of the charge and (c) that it is made with understanding of its consequences.[24] If such personal inquiry is omitted with respect to any one of the three subjects, the defendant is entitled to plead anew.

The petitioner McCarthy, represented by retained counsel, had pleaded guilty to "wilfully and knowingly" attempting to evade tax payments. At plea, his counsel informed the court that he had advised McCarthy of the consequences of the plea and the court's own inquiry confirmed that the defendant knew that his plea would entail waiver of trial and exposure to a stated punishment. The court also complied with a second requirement of Rule 11 by eliciting the defendant's statement that no threats had induced the plea and that it was being entered voluntarily. 394 U.S. at 461, 473.

But the trial court did not address the defendant personally to determine whether he understood the

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[24] The requirement that the court find "a factual basis for the plea" need not be satisfied by direct inquiry of the defendant. Notes of Advisory Committee, Rule 11, Fed.R.Crim.P. See *McCarthy, supra,* at note 6. This is a salutary rule since a mandatory personal inquiry might deter pleas by those who decline to admit the facts but wish to plead nonetheless. See *North Carolina v. Alford, supra.*

nature of the charge which required specific intent—a "knowing and willful" attempt to evade. 394 U.S. at 470-1. At sentencing, McCarthy and his counsel urged that his acts had been merely negligent or inadvertent, under the influence of a serious drinking problem. If so, as this Court later observed, McCarthy may have been guilty of only a lesser included offense. 394 U.S. at 471. On appeal, the defendant contended, *inter alia*, that his plea was invalid by reason of the district court's failure to address him personally and determine that he understood the nature of the charge. But the Court of Appeals sustained the plea, implying that Rule 11 did not always require such personal inquiry. 394 U.S. at 463. This Court reversed, rejecting the Government's argument that under Rule 11 the district court could properly have *assumed* the defendant's understanding from his expressed volition to plead and his understanding of the consequences of the plea.

In demanding strict compliance with each requirement of Rule 11, this Court addressed the purposes of the Rule in terms that relate the plea proceeding to the question of post-conviction attack presented here. The Court observed first that Rule 11 "is designed *to assist* the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary." (emphasis supplied) 394 U.S. at 465. Notably, it did not say that the defendant's admission of voluntariness conclusively disposes of that issue. Secondly, the Court explained that

> the Rule is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination. Thus, the more meticulously the Rule is adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of, the numerous and often

> frivolous post-conviction attacks on the constitutional validity of guilty pleas. 394 U.S. at 465.

Accordingly, the *McCarthy* Court made clear that Rule 11 was designed with an eye to its impact upon subsequent collateral attack—to discourage such attacks and to expedite treatment of them. But the Court did not hold that simple compliance with the requirements of Rule 11 forecloses *per se* all collateral inquiry.

The *McCarthy* treatment of that relationship amplifies understanding. With respect to relatively simple issues such as the defendant's "understanding of the nature of the charge," it may well be possible to rebut "conclusively," 28 U.S.C. § 2255, a collateral claim of ignorance on that point by a fully developed record at plea. If a defendant at plea explicitly confirms "his understanding of the essential elements of the charge" 394 U.S. at 467-8, note 20, particularly where lesser offenses are encompassed, a § 2255 court may well be able to determine, without an evidentiary hearing, that a subsequent claim of ignorance is "conclusively" refuted by the "files and records" of the case.[25] As to this subject in particular, the *McCarthy* Court observed:

> There is no adequate substitute for demonstrating *in the record at the time the plea is entered* the defendant's understanding of the nature of the

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[25] See *e.g.*, *United States v. Woosley*, 440 F.2d 1280 (8th Cir. 1971). This will be particularly true if a defendant is asked questions that call for his own expression of the charges rather than "Yes" or "No" answers. *Woosley*, *supra* at 1281. See the recommendation of the American Bar Association Project, *Standards Relating to Providing Defense Services*, p. 63 (Approved Draft, 1968).

charge against him.[26] (emphasis in original) 394 U.S. at 470.

The ultimate question of the "voluntariness" of the plea, however, presents another kind of problem. And although not called upon to decide that issue, the *McCarthy* Court's careful language reflects its sensitivity to the difference. Nowhere does this Court suggest that a defendant's denial of threats or affirmation of "voluntariness" at plea will conclude the "voluntariness" issue forever. To be sure, no plea can be valid at all unless the defendant is addressed on that subject and expresses his voluntary decision to plead. Absent such an inquiry, a defendant can obtain appellate reversal of the judgment without more.[27] But it does not follow that the voluntariness determination at plea is sufficient "conclusively" to dispose of detailed collateral allegations of coercion.[28]

[26] It is possible, of course, for a prisoner subsequently to allege "incompetence" at plea in order to challenge his apparent "understanding" reflected on the Rule 11 record. But such claims are more difficult to fabricate without at least some pre-existing hint of "incompetence" in the record. Frequently, they can be denied without a hearing as insufficiently particularized to warrant further evidence. See *e.g., Hayes v. United States,* 399 F.2d 691 (5th Cir. 1968) Moreover, it is doubtful that "incompetence" allegations constitute a major source of post-conviction litigation.

[27] *McCarthy* explicitly affirms "our holding that any noncompliance with Rule 11 is reversible error." 394 U.S. 464 at note 9, by noting that "prejudice inheres in a failure to comply with Rule 11 . . . . " *Id.* at 471.

[28] In *Boykin v. Alabama,* this Court decided an analogy to *McCarthy* for state courts, holding that, as a matter of constitutional requirement, a state guilty plea record must contain "an affirmative showing that [the plea] was intelligent and voluntary." 395 U.S. 238, 242. But, as here, the Court did not hold that such a record *forecloses* collateral attack. Instead, it observed that an adequate plea proceeding "*forestalls* the spin-off of collateral proceedings that seek to probe murky memories." (emphasis supplied) *Id.* at 244.

The *McCarthy* Court carefully refers to "the defendant's statement that he desired to plead guilty . . . [and his] statement that the plea was not induced by any threats or promises," as a "prima facie case for voluntariness." 394 U.S. at 469. But a "prima facie case" clearly is not a "conclusive" one in the terms of § 2255.

Such an acknowledgement does not mean, however, that a thorough inquiry into voluntariness at plea is of no utility in expediting any post-conviction disposition that may be necessary. Again, the *McCarthy* opinion speaks directly, but carefully, to the point:

> *To the extent that* the district judge thus exposes the defendant's state of mind on the record through personal interrogation, he not only facilitates his own determination of a guilty plea's voluntariness, but he also *facilitates that determination in any subsequent post-conviction proceeding based upon a claim that the plea was involuntary*. 394 U.S. at 467. (emphasis supplied)

Implicit in this "facilitation" language is a recognition that post-conviction determinations of voluntariness may not be avoidable altogether since allegations of facts dehors the record are always possible.[29] But the more thoroughgoing the inquiry at plea, the more expeditious post-conviction dispositions may be.[30] It may even be

[29] The same recognition is implicit in other language of the opinion: "By personally interrogating the defendant, not only will the judge be better able to ascertain the plea's voluntariness, but he will also develop a more complete record to support his determination in a subsequent post-conviction attack." 394 U.S. at 466.

[30] For example, it does not follow that because a defendant's statements at plea do not "conclusively" dispose of a later attack, they also have *no* weight in a subsequent proceeding. Moreover, subsequent allegations, read in the context of a full Rule 11 inquiry, may reduce the need for a full evidentiary hearing. Neither

that in some cases, subsequent allegations will be so unlikely or so narrowly disputed that they can be investigated and determined by affidavit, deposition, or without the presence of the movant. *Machibroda v. United States, supra* at 495.

The Rule 11 record in the case at bar serves by contrast to highlight the point. Although it might barely be said to disclose compliance with the minimum Rule 11 requirement, it also discloses a skimpy and disordered proceeding that is the antithesis of the *McCarthy* goal—where "reality, and not mere ritual, [is] controlling." 364 U.S. at 467-68, note 20.[31]

The ritual here is apparent from the outset. The defendant, unaided by counsel, appears in court having already signed waivers of counsel and indictment submitted to him by the prosecutor. (A 3) The court, without explaining the meaning of the right to indictment or confirming that the defendant understands the import of it, does no more than ascertain that the defendant has signed the grand jury waiver. (A. 4) The "waiver" of counsel is then treated with even less concern to assure that the defendant has intelligently considered its meaning and actually intends to proceed alone.[32]

Machibroda nor any other case deprives a §2255 court of "discretion" to shape a hearing in accord with the fact-finding needs arising from the particular dispute engendered by a §2255 motion. 368 U.S. at 495.

[31] Strictly speaking, this trial court did not fully explain the jurisdictional element of the federal bank robbery to the defendant. Accordingly, we do not concede full compliance with Rule 11.

[32] For the reasons presented at pp. 47-56 *infra*, this "waiver" should be held invalid and is thus by itself a ground for voiding the plea proceeding.

THE COURT: In addition you are entitled to be represented by an attorney and, if you are without funds with which to employ an attorney, the Court will appoint one for you. The Court has here before it a waiver of assignment of attorney. Is it your wish to proceed here without an attorney?

DEFENDANT FONTAINE: I guess so.

THE COURT: You have got to know so.

DEFENDANT FONTAINE: Yes, sir. (A. 4)

This so-called "waiver" is then left unreexamined in the face of the defendant's subsequent remark: "I don't know too much about the law because I have never been in Court before." (A. 5)

Upon that shaky foundation, the proceeding touches upon, but no more, each of the minimum *McCarthy* requirements. With respect to the consequences of the plea, the court recites the maximum penalty and asks: "You understand the maximum penalty?" "Yes, sir." (A. 4) But no explanation is given as to what a guilty plea is or what rights it waives. On the subject of voluntariness, three brief questions are put pertaining to promises, threats and "knowingly and freely and voluntarily offering your plea of guilty here." (A. 3,4) The defendant continues to produce appropriate denials and affirmations in monosyllables: "No, sir," "No, sir," "Yes, sir." The Court's inquiry as to the "nature of the charge" includes, at the request of the prosecutor, a cursory factual inquiry into the actual armed bank robbery.[33]

[33] This "inquiry" would also seem to establish "a factual basis for this plea." Rule 11, Fed.R.Crim.P. As noted, however, the Court did not explain or inquire into the federal element of the robbery offense. That typifies the carelessness of the plea proceeding.

(A. 5) Ironically, however, the proceeding winds down with the Court confused as to the nature of the charge and the names of the alleged perpetrators. (A. 6)

> THE COURT: He is charged with aiding and abetting Gregory Edward Lee.
>
> MR. ZANGLIN: No, I think Edward Gregory Lee abetted him.
>
> THE COURT: Aided and abetted by Edward Gregory Lee. That's the charge, do you understand that?
>
> DEFENDANT FONTAINE: Yes, sir.

The ritualistic nature of the process is perhaps most clearly manifest in the closing dialogue.

> THE COURT: Is it your wish that the Court accept your plea?
>
> DEFENDANT FONTAINE: Well, your Honor I wish you would accept my plea on the fact that I have never had a past record. I got strung up on the drugs and started to make some money.

Despite the indication contained in that answer that the defendant may understand his "plea" as a plea for mercy or leniency rather than a plea of guilty, the Court takes no steps to clarify his state of mind.

Nor is there any inquiry at that point as to whether the defendant is presently on drugs, in withdrawal, or otherwise in an impaired state of competence. The court of appeals below was thus utterly without a basis for its conclusion that the district court "determined . . . that he was not under the influence of drugs at the time. . . ." (A. 34) And its one-paragraph order affirming the summary denial below is no more than a shaky capstone set upon this flimsy process—a ritual piled upon ritual. But even if this formalistic appellate endorsement were fully

accurate, it is no better than the initial proceedings at obscuring the skimpiness of the inquiry undertaken. In light of that inquiry, it verges on the preposterous to conclude that such a record can be taken "conclusively" to rebut petitioner's subsequently detailed allegations.

By means of its required personal inquiries, Rule 11 guards the door against pleas entered by defendants who do not kr w that they need not plead, or who do not understand what they are pleading to or what can happen as a consequence. It also enables the trial court to reject a plea at the threshold when a defendant reflects doubt about his willingness or understanding. In some cases, a thorough inquiry at plea, sensitively tailored from case to case, *McCarthy, supra* at note 20, may provide a record adequate to dispose of a subsequent challenge or at least to "facilitate" disposition. But it utterly distorts the appropriate function of the Rule to suggest that by minimum adherence to a ritual it forever satisfies the important fact-finding tasks critical to the protection of constitutional rights.

Indeed, a ritual such as that performed in this case hardly deserves description as a fact-finding process. Even if it were one, however, it plainly did not develop any *facts* pertaining to the subsequent claim of coercion. It would thus renege upon the promise of the *Hayman* case, *supra*, to deny a hearing here in reliance on a ritual, but to require one in federal habeas where the "material facts were not adequately developed" at the prior hearing but at least some fact-finding hearing had been held. *Townsend v. Sain*, 372 U.S. 293, 313; *Kaufman v. United States*, 394 U.S. 217, 227.

Moreover, in *Sanders* this Court specifically permitted rehearing of a claim under §2255 that had previously been rejected on the merits if the prior hearing was not

full or the ends of justice would be served. 373 U.S. 15-17. Conclusive reliance upon a minimum Rule 11 proceeding where the claim was not even tendered is thus thoroughly inconsistent with *Sanders* and at war with *Hayman's* guarantee that §2255 is a remedy as broad as habeas corpus.

Thus even if this Court should find that the plea proceeding in this case satisfied Rule 11 and *McCarthy*, such a holding does not preclude a hearing on the voluntariness of the plea and the competence of the pleader under §2255.

IV. THE GUILTY PLEA WAS INVALID FOR WANT OF A VALID WAIVER OF COUNSEL ON THE FACE OF THE RECORD.

A. The Invalidity of the Waiver

"Since *Gideon v. Wainwright*, 372 U.S. 335 (1963), it has been clear that a guilty plea to a felony charge entered without counsel and without a waiver of counsel is invalid." *Brady v. United States*, 397 U.S. 742, 748-9 at note 6. Even prior to *Gideon*, however, this Court made clear that not every apparent "waiver" counts, where the right to counsel is at stake. The standard for a *valid* waiver of counsel was set forth in *Carnley v. Cochran*, 369 U.S. 506, 516:

> *The record must show* . . . that an accused was offered counsel but *intelligently* and *understandingly* rejected the offer. Anything less is not waiver. (emphasis supplied)

And as late as 1969 this Court reiterated the "requirement that the prosecution spread on the record," not merely the *rejection* of the right, but the "*prerequisites*

of a valid waiver. . . ."[34] *Boykin v. Alabama,* 395 U.S. 238, 242. (emphasis supplied)

Accordingly, an uncounseled guilty plea is valid only if the alleged waiver of counsel meets three criteria: (1) an accused must reject an offer of counsel; (2) he must do so "intelligently and understandingly"; and (3) the record must affirmatively establish these prerequisites.

This standard, requiring not mere rejection of an offer, but *record proof* of an "intelligent" and "understanding" rejection, derives from this Court's most honored "waiver" case, *Johnson v. Zerbst,* 304 U.S. 458, 464, which has set the benchmark from its decision in 1938 through an unbroken line of cases to the present.[35] *Johnson* announced the basic "waiver" definition—"an intentional relinquishment or abandonment of a known right or privilege," 304 U.S. at 464, but it also made luminous that even an intentional relinquishment is not a valid waiver unless the right to counsel was also abandoned "intelligently." 304 U.S. at 468.

To implement the requirement that a "waiver" be intelligent, as well as voluntary, *Johnson* imposed a duty

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[34] Although *Boykin* dealt with the waivers involved in a guilty plea, it expressly adopted the waiver of counsel rule in *Carnley* and held "that the same standard must be applied. . . ." 395 U.S. at 242.

[35] Some of the major cases in the line from *Johnson* include: *Walker v. Johnston, supra,* at 288 (1941); *Waley v. Johnston, supra,* at 104 (1942); *Hawk v. Olson,* 326 U.S. 271, 275 (1945) ("intelligent" waiver required); *Von Moltke v. Gillies,* 332 U.S. 708, 720 (1948) ("full understanding and comprehension"); *Moore v. Michigan,* 355 U.S. 155, 161 (1957) (mere rejection insufficient; "intelligently and understandingly"); *Miranda v. Arizona,* 384 U.S. 436, 475 (1966) ("knowingly and intelligently"); *Barker v. Wingo,* 407 U.S. 514, 525-26 (1972).

of searching inquiry upon a trial judge confronted with an apparent abandonment of the right to counsel. He must make a clear record determination of the waiver prerequisites:

> The determination of whether there has been *an intelligent waiver* of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused. . . . The constitutional right of an accused to be represented by Counsel invokes, of itself, the protection of a trial court, in which the accused . . . is without Counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an *intelligent and competent waiver* by the accused. While an accused may waive the right to Counsel, whether there is a *proper waiver* should be clearly determined by the trial court . . . " *Id.* at 464-65. (emphasis supplied)

In years subsequent, the Justices of this Court have relentlessly pursued the *Johnson* standards. Mr. Justice Frankfurter put the *Johnson* requirement of an "intelligent" waiver, this way:

> the Constitution does not force a lawyer upon a defendant. He may waive his Constitutional right to assistance of counsel *if he knows what he is doing and his choice is made with eyes open.* (emphasis supplied) *Adams v. McCann,* 317 U.S. 269, 279.

And Mr. Justice Black described the nature of a trial judge's duty to ensure that a defendant's eyes *are* open:

> To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case

> before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defense to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. *A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination* of all the circumstances under which such a plea is tendered. *Von Moltke v. Gillies,* 332 U.S. 708, 723-74.[36]

Only after such a "penetrating and comprehensive" inquiry can the record confirm the prerequisites of a valid waiver.

In guilty plea cases, the waiver of counsel has traditionally been regarded by this Court with special solicitude. See *e.g., Brady v. United States, supra* at note 6. For in those cases, the requirement of an "intelligent" relinquishment of counsel critically implements the standard that the plea itself is valid only "if both 'voluntary' and 'intelligent.' " *Brady, supra* at 747. The plea constitutes "a waiver of the fundamental rights to a jury trial, *Duncan v. Louisiana,* 391 U.S. 145, to confront

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[36] Although Mr. Justice Black spoke for a plurality of four in *Von Moltke,* the entire Court, indeed the Government as well, confirmed that even a "written and otherwise clearly stated waiver of counsel" is invalid if not "freely, intelligently, and knowingly made." 332 U.S. at 731-32 (Burton, J. dissenting). And the case persists as a leading "waiver" precedent in this Court. See *e.g., Brady v. United States,* 397 U.S. 742, 748 at note 6.

one's accusers, *Pointer v. Texas,* 380 U.S. 400, to present witnesses in one's defense, *Washington v. Texas,* 388 U.S. 14, to remain silent, *Malloy v. Hogan,* 378 U.S. 1 and to be convicted of proof beyond all reasonable doubt, *In re Winship,* 397 U.S. 358." *Santobello v. New York,* 404 U.S. 257, 264 (Douglas, J. concurring). But the waiver of counsel might justly be described as the "domino" waiver from which all others readily flow. This Court has all but so described it in acknowledging that "an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney. . . ." *Brady v. United States, supra* at note 6.

The critical role of counsel in ensuring that a plea is "intelligent", as well as voluntary, invokes a heightened duty of trial court inquiry when an apparent waiver of counsel is tendered. In such cases, it should be imperative that trial courts follow the *Von Moltke* directive to "make certain that an accused's professed waiver of counsel is understandingly and wisely made . . . [by] a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered." 332 U.S. at 724.

Leading cases in the courts of appeals have acknowledged, however, that "federal courts have looked to the substance of the *Von Moltke* formulations, and not to its formulas." See *e.g., Spanbauer v. Burke,* 374 F.2d 67, 72 (7th Cir. 1966); *United States v. Warner,* 428 F.2d 730, 734 (8th Cir. 1970). This Court is respectfully referred to the *Spanbauer* case, still regarded as containing "perhaps the most exhaustive study of the law of waiver of counsel as applied in the various circuits. . . ." *Warner, supra* at 734. That study discloses widespread departures from the particular inquiries Mr. Justice Black's "formulas" demanded. But no court of appeals, except the one

below, has abandoned the underlying requirement that a trial court accept a waiver only "after a determination reflecting that under the particular facts and circumstances of the case, including the background, experience and conduct of the accused, the waiver was made by the accused intelligently and understandingly. . . ." *Spanbauer, supra* at 74.

At the very least, even appellate courts softening the *Von Moltke* formulas have demanded "positive and unequivocal answers" from the defendant, repeated judicial advice "of the desirability of his being represented by an attorney," and meticulous emphasis upon the seriousness of the offense beyond a mere statement of the maximum penalty. See *e.g., United States ex rel Miner v. Erickson,* 428 F.2d 623, 627 (8th Cir. 1970) (Blackmun, J.). For comparative purposes, the guilty plea and waiver of counsel proceedings in the *Miner* case are reproduced in the Appendix to this Brief.

Whether or not minimal requirements such as these satisfy this Court's waiver standards, they condemn by contrast the perfunctory and formalistic inquiry conducted by the trial court in this case. Whatever standard this Court ultimately adopts, it should banish as beneath it any suggestion that a valid waiver of counsel appears upon the record here.

The trial court in this case was confronted with a defendant who had already signed in-custody waivers of counsel and indictment. Nonetheless, the court made no effort whatever to inform the defendant of the importance of the right to counsel, to explain what a guilty plea entails, or to suggest that counsel can be helpful or desirable in connection with a plea. *Contrast, United States ex rel Miner v. Erickson, supra* at 627-28. Neither

did the court inform the accused that the waiver he had signed earlier was not binding upon him and could be reconsidered now. This omission was particularly important, for the court's questioning as to counsel followed immediately upon the subject of the written "waiver" of indictment. And as to that "waiver," the court did little more than ascertain that the defendant had signed it. That form of indictment inquiry is bound to leave a spill-over impression that a prior written waiver is binding as to counsel as well. Surely it defies common sense to ignore that, unless advised otherwise, a layman will commonly regard his signature as tying him down.

To be sure, the court then inquired whether the defendant wanted a lawyer. But that colloquy only demonstrates the sterility of the proceeding as a whole. After formally reciting the defendant's right to counsel, the court made references to the written waiver "here before it" and asked whether the accused wished "to proceed here without an attorney." The defendant replied, "I guess so." Although an occasion was thus provided to underscore defendant's freedom to change his mind, the court did no such thing. *Cf. Miner, supra* at 628. Instead it spoke in terms, with a mandatory overtone, that could only *encourage* relinquishment of counsel. "You have got to know so." And the defendant replied ambiguously: "Yes, sir." This reply was not an adequate expression of intent to relinquish counsel, for the defendant's response appears to acknowledge only that he may not "guess" about the waiver. It does not affirm his intent to make it.

Read charitably, however, the "Yes, sir" answer *might* reflect an intent to proceed unaided, particularly if the listener desired that result. But when *any* ambiguity is present, it is little to ask that a trial court confirm the defendant's intent in "positive and unequivocal" terms. *Cf. Miner, supra* at 627.

Moreover, any court sensitive to the "substance," even if not the "formulas" of *Johnson* or *Von Moltke*, would surely refrain from encouraging a waiver tendered with such ambiguity. It is the obligation of a court in such circumstances to explain to a layman that he should not "guess" whether to waive counsel, and should recognize that a lawyer is not only useful *at trial*, but often important as well to "an intelligent assessment of the relative advantages of pleading guilty." *Brady, supra* at note 6.

At the very least, it is incumbent upon a trial court to avoid giving any possible impression that, *in order to* plead guilty, "you have got to know" that you wish to proceed without counsel. Laymen are all too likely to assume that a lawyer is useful only at trial and thus to interpret an offer of counsel at plea as just another way of asking whether an accused intends to plead or to go to trial with a lawyer.[37]

When doubt appeared in this proceeding, however, the trial court did not even do so much as reiterate an offer of counsel. *Cf. Miner, supra* at 627-29. Neither did it do so after the defendant remarked, moments later: "I don't know too much about the law because I have never been in Court before." Such an observation by an accused calls for renewal of the offer of counsel, *Cf. Miner, supra* at 627-31, if not, indeed, some inquiry into "the background, experience and conduct of the accused," *Johnson, supra* at 464-65; *Spanbauer, supra* at 74. But throughout this proceeding, the trial court made only one

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[37] Studies confirm the incidence of such confusion. Remington, *Defense of the Indigent in Wisconsin*, 37 Wis. B. Bull 40 (1964); Elison, *Assigned Counsel in Montana*, 26 Mont. L. Rev. 1 (1965); Newman, *Conviction*, p. 204 (Am. Bar F. 1966).

ritualistic offer of counsel, and never even began to explore the nature of the particular defendant who had apparently rejected it or why he would choose to do so.[38] Indeed, even after the defendant alerted the court to his use of drugs, there was no inquiry as to their possible impact upon him at plea.

Established doctrine that "courts indulge every reasonable presumption against waiver," *Johnson v. Zerbst, supra* at 464; *Barker v. Wingo,* 407 U.S. at 525 counsels rejection of this alleged waiver as ambiguous. It does not even unequivocally satisfy the first waiver criterion, *supra.* Even if the record be read, however, to reflect a rejection of counsel, it would trivialize the meaning of an "intelligent" waiver to find one affirmatively established on this record. Cases in the courts of appeals already reflect erosion of that Sixth Amendment requirement. This case reflects utter disregard for it. It is time to put a stop to that trend. This Court should strike this bare-boned plea as invalid and remand to the district court with instructions to vacate sentence and to permit petitioner to plead anew.[39]

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[38] It is thus particularly ironic, as well as insupportable, that the trial court's opinion concludes: "Each time the court offered petitioner the assistance of counsel prior to acceptance of his plea, such offer was declined." (A. 30) There was only one such offer. No solace derives from the petitioner's second "waiver" of counsel *at sentencing.* (A. 8) The "waiver" inquiry at that point was even more limited than at plea. Moreover, the principal functions of counsel had already been bypassed by the prior waiver. Since the "cat was already out of the bag," it adds nothing that petitioner acquiesced in a second formality.

[39] The §2255 motion asserts that the waiver was invalid for want of understanding the "consequences." (A. 11) The trial court rejected that contention. (A. 30) The court of appeals ignored it, as it did the requirement that a valid plea must be both "voluntary" and "intelligent". It affirmed upon the simple finding that the plea was voluntary. (A. 34)

B. Should Any Waiver Be Permitted?

Few would disagree that the guilty plea is "perhaps the most devasting waiver possible under our Constitution." *Dukes v. Warden*, 406 U.S. 250, 257 (Stewart, J. concurring). It is no less obvious that "an intelligent assessment of the relativ advantages of pleading guilty is frequently impossible without the assistance of an attorney. . . ." *Brady, supra* at note 7. Yet, roughly one of every five federal defendants pleading guilty does so after waiving counsel.[40]

This case affords this Court an opportunity, under its supervisory power, to enhance the reliability of the guilty plea by precluding the uncounseled plea altogether, or at least requiring that no waiver of counsel be accepted unless the pleading defendant has at least once considered the waiver with counsel.

Several States have already adopted substantially similar protections.[41] Some courts have adopted such rules as

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[40] This conclusion is derived from statistics generously compiled at the request of counsel by the Administrative Office of the United States Courts. The statistics relied upon encompass both guilty and *nolo contendere* pleas during the fiscal years 1969-1972 in 89 United States District Courts, exclusive of the District of Columbia and the territories. The breakdown is as follows:

Fiscal	Total Pleas	Pleas with Waivers
1969	23,138	4,532
1970	24,111	4,347
1971	27,544	4,679
1972	29,751	5,835
	104,544	19,393

[41] See *e.g.* Ala. Code, Title 15 §§260, 262 (1958) (felony cases); Cal. Pen. Code §§1108 ("life" or "death" cases); Tex. Code Crim. P. §1.13 (felony); Va. Code §19.1-19.2 (1960) (felony).

a matter of practice.[42] And the modified no-waiver rule, requiring at least prior consultation with defense counsel, has been adopted as a minimum standard by the American Bar Association. *Standards Relating to Providing Defense Services*, §7.3, p. 65 (Approved Draft 1968).

This Court has apparently rejected the contention that the Constitution requires such a rule. *Adams v. McCann*, 317 U.S. 269, 277-80.[43] But the supervisory power is appropriately used where the probability of injustice is high absent the rule imposed, see *Brady*, *supra* at note 6, and the cost of the rule is relatively low.[44]

Any analysis of cost should consider the decreased systemic costs deriving from the extent to which the presence of counsel at plea will deter, or facilitate disposition of, subsequent collateral attacks. Although the popular conception is false that the tide of collateral attack is ever-rising, this Court has acknowledged "the great waste of judicial resources required to process the

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[42] See Newman, *Conviction*, p. 51 (Am. Bar F. 1966); *Accepting the Indigent Defendant's Waiver of Counsel and Plea of Guilty*, 22 U. Fla. L. Rev. 455, 467; Kamisar & Choper, *The Right to Counsel in Minnesota*, 48 Minn. L. Rev. 1, 34-35.

[43] At least one court, however, in the course of a thorough analysis of a related question, has read the language in *Adams* as *dictum*. *United States v. Dougherty*, (D.C. Cir. June 30, 1972, pp. 13-14 (slip opinion)).

[44] Although economic considerations are but one element of "cost," they are relevant. Unfortunately no figures are available to show how many defendants who waived counsel in 1969-72 would have been eligible for appointment of counsel if waivers had been precluded. As of 1969, however, 42% of federal defendants required assigned counsel. Federal Offenders in the United States District Courts, p. 6 (Admin. Office 1969).

frivolous attacks on guilty plea convictions," when the plea proceeding is inadequate.[45] *McCarthy, supra* at 472. The focus upon the counseled plea in the guilty plea trilogy is a further acknowledgement of the role of counsel in diminishing post-conviction challenges. A requirement that all pleas be counseled would be an even more solid affirmative step in securing the adequacy of the plea proceeding. It may be that, with such a rule, accompanied by expanded plea inquiries and evolving standards of adequate counsel, the criminal justice system can fairly develop a guilty plea that will appropriately constitute a waiver of all litigation, direct and collateral.[46]

Even without such a goal, however, no system should tolerate the degree of unfairness it already acknowledges as inherent in the uncounseled plea. This is particularly true for the federal system where the question of "guilt" may often turn upon a technical jurisdictional element or a complex scheme of regulation. But it is true in any

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[45] Statistics contained in his report confirm the observation of the Director of the Administrative Office that the volume of prisoner petitions in the federal courts "has apparently stabilized." *Annual Report of the Director*, p. 132 (Adm. Office 1971). See also *Annual Report of the Director*, II-28 (Adm. Office 1972).

[46] There is a Proposed Amendment to Rule 11, 52 F.R.D. 415. No suggestion is intended here that it would be enough. The problem is to arrive at a plea proceeding at which the waiver of the right to contest is fully intelligent. The details of such a proceeding are beyond the scope of this case, except that the required presence of counsel is clearly a first step.

It may also be that no system can be devised that can fairly eliminate subsequent attacks based upon "incompetence" to waive at plea. But that caveat does not diminish the utility of a system which would at least reduce the availability of interminable litigation.

system where the coercive pressures of custody, such as those alleged here, can operate. This Court has traditionally looked to the lawyer to "break . . . the stream" of coercive events. *Compare Darwin v. Connecticut*, 391 U.S. 346, 349 with *Parker v. North Carolina*, 397 U.S. at 796; or to attenuate the effect of coercion prior to plea. *Parker v. North Carolina, supra* at 796. In the interest of justice, it should see to it now that no federal defendant pleads guilty without one.[47]

Since petitioner Fontaine was unrepresented throughout, this Court should reverse and remand with instructions to grant the motion he filed under 28 U.S.C. §2255.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed with instructions to the district court to vacate sentence.

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[47] The existence of 28 U.S.C. §1654 guaranteeing the right of parties to "plead and conduct their own case personally" may refer only to contested cases. If not, that statute still might not preclude the appointment of *amicus curiae* to consult with a defendant who expresses a wish to waive counsel.

Although the matter is not free from doubt, it seems tenuous that there is any constitutional right to plead guilty *pro se*. See *People v. Sharp*, (Calif. Supreme Court, July 7, 1972); see also, *State v. Thomlinson*, 100 N.W.2d 121 (S.D. 1960) (pre-waiver compulsory counsel does not violate state *pro se* constitutional right).

Alternatively, that court should be instructed to grant petitioner a full evidentiary hearing upon all of the allegations advanced in his §2255 motion.

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APPENDIX

The transcript of the waiver of counsel and plea of guilty in *United States ex rel Miner v. Erickson*, 428 F.2d 623, 628-31 (8th Cir. 1970):

BY THE COURT:

Q. Is that your true name–Nelson Miner? A. Yes, sir.

Q. What is your age? A. Forty.

Q. Do you have an attorney? A. No, sir.

Q. Now, this is a serious criminal offense and is punishable by imprisonment in the South Dakota State penitentiary for not more than 20 years which makes it a very serious criminal offense and the Court believes that in such a case a man should be represented by an attorney. You know of course that you are entitled to be represented, if you so desire. You know that? A. Yes.

Q. And that in any criminal action in circuit court where it is shown that the defendant is without means and unable to employ counsel the court shall assign counsel for his defense whose duty it shall be to appear for and defend the accused upon the charge against him and counsel so assigned shall be paid by the county. Now, you understand that you are entitled to be represented by an attorney? A. Yes, sir.

Q. And, if you were without means and funds to hire one you would still be entitled to an attorney and that the court would appoint one for you. Do you understand that? A. Yes.

Q. Do you want an attorney? A. No, sir.

Q. What? I didn't hear your answer? A. No, sir.

Q. You understand it is a serious offense do you? A. I do uh-huh.

Q. By that do you mean yes? A. Yes, sir.

Q. How much education have you had? A. Sixth grade is all.

Q. Sixth grade. Do you understand what I am discussing with you here in court? A. Yes, sir.

Q. And you know this is a serious offense? A. Yes, sir.

Q. And you wish—you want the court to understand that you do not want an attorney. Is that right? A. That is right.

Q. You understand that the court has recommended to you that you do have an attorney. You do understand that? A. Yes, sir.

Q. Very well. I understand that the states attorney has filed an information charging you with indecent molestation of children. Do you understand what that is? A. Yes, sir, I do.

Q. And as I have told you you can be imprisoned up to 20 years in the penitentiary for that offense. Do you understand that? A. Yes, I understand.

Q. And it is a felony. It is a serious offense. Now, in addition to this right to be represented by an attorney you also have a right to appear in court and defend yourself. Now, I want to ask you if you understand that you have that right? A. Yes, sir.

Q. You also have the right to demand the nature of the charge or accusation against you and to have a copy of it. Do you understand that you have that right? A. Yes, sir.

Q. You understand too that every person is presumed to be innocent of the charge against them unless they either admit their guilt or are proven to be guilty. Do you understand that? A. Yes, sir.

Q. You also have the right to meet the witnesses against you face to face in open court to see and to hear them testify. Do you understand that you have that right? A. Yes, sir.

Q. You also have the right to have compulsry [sic] process of the law served for obtaining witnesses in your own behalf. Do you understand that you have that right? A. Yes.

Q. And the right to a speedy and a public trial by an impartial jury of the county in which the offense is alleged to have been committed in this case Dewey County, South Dakota. That means that you are brought to trial speedily at the next term of the court and that you have an impartial trial. That means a fair trial. Do you understand that you have a right to that? A. Yes, sir.

Q. Now, is there anything about your being brought here or coming before the judge today that you don't understand? A. No, sir.

Q. You understand that you are here because they charge you have committed a serious felony? A. Yes, sir.

Q. Now, do you want a trial? That means to determine whether or not you are guilty or not guilty or innocent? A. No, sir.

Q. You do not want a trial? A. No, sir.

Q. You know that you can have one and that [you] are entitled to it? A. Yes, sir.

Q. Now, that is not regular time for the trial of cases in this county. That is in May. Now, did you ask to be brought here before the judge today? A. Yes, sir.

Q. Was it your idea to come here? A. I want to get the sentence over with.

Q. You want to get it over with? A. Yes, sir.

Q. And is that why you are here today? A. Yes, sir.

Q. Did you decide that yourself? A. Yes.

Q. No one tried to talk you into that? A. No, sir.

Q. And you understand that if you would enter a plea of guilty all this court would have left to do would be to sentence you. Do you understand that? A. Yes.

Q. Now, are there any facts that you think a lawyer could present for you that would help your case in any way? A. No, sir, I don't think so.

Q. You don't think so? A. No.

Q. Are you appearing here today of your own free will? A. Yes, it is my free will.

Q. Are you ready at this time to enter a plea to the information? A. Yes, sir.

Q. Mr. Aberle:

MR. ABERLE:

Here Mr. Nelson is a copy of the information which I have filed against you and which I will read at this time.

(The information was read aloud and in full at this time)

Q. Nelson Miner, I will ask you if you understand what has been going on here in court? A. Yes, sir, I understand.

Q. I will again ask you, if you would like to consult with an attorney about this matter? A. No, sir.

Q. Now, Nelson Miner, you have heard the states attorney, Mr. Aberle, read the information charging you with the crime of indecent molestation of minor children under the age of 15 years and the names are Colleen Marie LaPlant of the age of six years and Rita Nadine LaPlant of the age of four years. Now, do you understand what you are charged with? A. Yes, sir.

Q. Now, before I ask you what your plea will be I must impress upon you that any plea that you make must be voluntary and it must be of your own free will. Do you understand that? A. Yes, sir.

Q. Are you ready to enter your plea? A. Yes, sir.

Q. Very well then what is your plea to this information charging you with indecent molestation of—that is, committing lewd and lascivious acts, deeds, signs and performances and conduct upon the persons of Colleen

Marie LaPlant of the age of six years and Rita Nadine LaPlant of the age of four years—in other words, that you did commit the crime of indecent molestation of children. Now, what is your plea—guilty or not guilty. A. Guilty.

Q. Let the plea of guilty be entered. The defendant stands convicted in this court of the offense of indecent molestation of minor children. Now, I want to ask you if you know of any legal reason why sentence should not be pronounced upon you? A. No, sir.

Q. Is that—is there any fact or facts about you that you think the court should know about? A. I don't believe so.

Q. Every defendant upon conviction for a felony is entitled to 24 to 48 hours or longer on good cause shown between the time of conviction and sentence. Do you understand that you have that right between the time of conviction and sentence? Do you understand that? A. Yes, sir.

Q. Do you wish to have the sentencing done at a later time or would you rather that the court would do it today? A. I would rather have it done today.

Q. You understand that you would then have to waive this right to time between conviction and sentence, do you? Do you understand that? A. Yes, sir.

Q. Now, is there any fact or facts surrounding either yourself or the commission of this offense that you wish to present to the court? A. No, sir.

Q. Is that anything that you want to tell me? A. No, sir.

* * * * *

Q. To your knowledge is there anything wrong with your with you? A. The only thing is when I am drinking.

Q. Do you think there is anything wrong with your mind? A. No, just drink.

Q. In other words that you don't know what you are doing when you are drinking, is that what you mean? A. Yes.

Q. Did you know these children? A. Yes.

Q. Did they live close to where you were living? A. I was staying with them at the time.

Q. With these LaPlants? A. Yes.

Q. Were their parents and you living in the same house? A. Yes, sir.

Q. Have you ever been in trouble before? A. Yes.

Q. What kind of trouble? A. I was up here before you once before three or four years ago.

Q. What was that for? A. Grand larceny.

Q. Did you serve any time in the penitentiary? A. No, you gave me a two year suspended sentence.